IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 511 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMESHBHAI MANIYABHAI NAYAK

Versus

STATE OF GUJARAT

Appearance:

MR JB DASTOOR for Petitioner No. 1

MR HM PRACHHAK, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 01/12/2003

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by original accused No.2 of the Session Case No.134 of 1994 of the Court of Sessions, Panchmahal at Godhra, against judgment and order dated 6.5.1995, convicting the present appellant for the charges proved against him under Sections 302 and 504 of the IPC and sentencing him for the imprisonment of life and fine of Rs.1,000/- in default to undergo rigorous imprisonment of two months. The incident leading to filing prosecution case against the appellant occurred on 23.5.1994. First Information Report in respect of the incident filed before the Halol Police Station by PW-2 Govindbhai Bhalabhai, and accordingly on the day of incident in the evening between 5.00 to 6.00 p.m. when PW-2 was at his residence, he noticed that deceased Khamanbhai Bhulabhai, who happened to be his nephew, was passing through the field of one Jeetaji, situated near the house of PW-2 Govindbhai Bhalabhai. At that time, present appellant with arrow and bow in hand and one Bakorebhai Balubhai Nayak - original accused No.1 in the Session Case, coming from opposite direction and both of them scolded deceased Khamanbhai that why he had involved both the accused in the theft case and both the accused threatened the deceased. Therefore, PW-2 Govindbhai ran towards the field, reached there, and saw that present appellant i.e. original accused No.2 shoot an arrow towards deceased Khamanbhai, which was hit to Khamanbhai on left side ribs and deceased fell down. Present appellant No.2 thereafter extracted the arrow from the body of the deceased and both the accused ran towards forest. Thereafter, PW-2 Govindbhai Bhalabhai searched for both the accused in the forest but they could not be found and Khamanbhai died shortly after the incident. According to the prosecution story, thereafter Sarpanch Chandubhai Gajabhai Nayak, PW-5 was called on the spot by PW-2 Govindbhai. PW-5 Chandubhai, Sarpanch of the village, wrote a report and gave the same to PW-2 and told him to deliver the said report before the Rameshara Police Station. According to PW-2 and the prosecution story, when he reached at Rameshara Outpost, one Head Constable was there, and he accompanied with PW-2 Govindbhai to Halol, where at about 1.30 a.m. on the next day written complaint of PW-2 was registered, which is on record at Exh.26. Investigation was taken over by PW-11 Parvatsinh Virsinh Baria, Senior PSI of Halol Police Station, and after investigation, a charge sheet for the offences punishable under Sections 302 and 504 read with Section 114 was preferred against the present appellant and original accused No.1 Rameshbhai Maniyarbhai Nayak before the court of Judicial Magistrate, First Class, at Halol, who in-turn committed

the said case to the Court of Sessions, Panchmahal at Godhra, which was registered as Session Case No. 134/1994.

2. Charge came to be framed against both the accused on 21st of March,1995 for the offences punishable under Sections 302, 504 and 114 of the Indian Penal Code along with Section 135 of the Bombay Police Act. On pleading not guilty by both the accused, prosecution examined in all 9 witnesses and produced documentary evidence on record. After considering the evidence on record and after hearing both the sides, learned Additional Sessions Judge, Panchmahal at Godhra, came to the conclusion that the offences charged against the accused No.1 Bakorebhai Balubhai were not proved and he was acquitted while learned Addl. Sessions Judge came to the conclusion that the present appellant - accused No.2 was liable to be punished for the offences under Sections 302 and 504 of the IPC. The learned Addl. Sessions Judge after hearing the accused awarded the sentence to accused No.2 - present appellant, as aforesaid, and hence this Appeal.

3. Learned Advocate Mr. J.B. Dastoor for the appellant and learned APP Mr. H.M. Prachhak for the respondent were heard at length. Learned Advocate for the appellant vehemently urged that the three eye witnesses examined by the prosecution are not reliable at all on account of material contradictions in the story narrated by each of the eye witness. Learned Advocate for the appellant draw our attention to each contradiction separately, which will be discussed later on. It was also submitted that neither arrest panchnama nor the panchnama of recovery of weapons i.e. arrow and bow could be proved by the prosecution so as to link present appellant with the crime. While learned APP supported the judgment and contended that the order and judgment impugned is not required to be interfered with. It was further contended that the witnesses are rustic and villagers and minor discrepancies would not be fatal to the prosecution case. It was contended that there are 3 eye witnesses of the incident and they are reliable. It was contended that the prosecution case has been proved beyond doubt through occular evidence.

4. It is the duty of this court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the evidence produced during trial can be relied upon or not, and that whether case against the appellant could be proved during trial beyond reasonable doubt on the evidence adduced. The credibility of a witness has to be adjudged in drawing

inference from proved and admitted facts emerging from record. After independent scrutiny of the evidence objective satisfaction has to be reached affirmatively that the case of prosecution was substantially true and that the guilt of the accused was proved beyond reasonable doubt during trial. Needless, it is to say that the judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful. Before convicting the accused by the Trial Court and while upholding the conviction, the court has to consider the matter carefully and examine all relevant material circumstances of the case. The above observations are necessary because from the facts emerging from the evidence, the prime question which would arise is whether the Trial Court acted in accordance with the aforesaid parameters while considering and appreciating the evidence which is on record.

5. Referring to the evidence of the prosecution, Sunilkumar Dhanrupmal Nagori, PW-1, is examined at Exh. 7, who performed postmortem of deceased Khamanbhai Bhulabhai at Halol Hospital at about 3.00 p.m. to 5.00 p.m. on 24.5.94. He stated that there was an oblique arrow shaped wound over the left border of last rib about 2 1/2 cms x 1 1/2 cms deep into abdomen. According to this witness, there was a corresponding internal injury, and cause of death was due to injury to Spleen. He has been cross-examined. He has stated that the injury was sufficient in ordinary course of nature to cause death. In examination in cross, the witness stated that if arrow is extracted from the wound, then there will be fountain of flood oozing from the wound.

6. PW-2 complainant - Govindbhai Bhalabhai is examined at Exh.9. According to his deposition, the incident took place at about 5.00 p.m. and he was at his residence when the incident took place. He witnessed the incident from his residence. The incident took place in the field of Jeetaji. Present appellant shoot arrow to deceased Khamanbhai ensuing the quarrel about the theft committed by the accused. Deceased was going to Galmpura. At that time, accused No.1 was accompanying the appellant. They were coming from southern direction while deceased was going to east to west. At that time, the arrow was shoot by the present appellant. Deceased had fallen down on receiving the wound of arrow. Thereafter, the witness reached at the spot. Appellant withdrew the arrow from the body of the deceased and ran away. The witness went to the Sarpanch, who came to the spot. He wrote a report and gave it to him. On foot,

according to this witness, he came to Ramsera Outpost where Head Constable was at station, who advised to go to Halol and accompanied him. On foot, both of them came to Halol Police Station and FIR was registered. According to him, he reached at Halol at about 12'O clock midnight. In cross examination, the location about the place of incident and the house of this witness is asked. Contradictions in first information report and omissions were also asked. The important fact is between the house of this witness and the place of incident, there is a field and house of one Phuliya, and there was a hedge all around his house and field. That was the allegation of the defence that due to this hedge, it was impossible for the witness to see the field of Jeeta where the incident took place. At one place in cross-examination, this witness admitted that there was a hedge all around the house of Phuliya and again in cross-examination he stated that it was possible for him to see the incident from his residence.

7. PW-3 Kidiben, widow of deceased Khamanbhai, is examined at Exh.10. According to her, at the time of incident, she and her husband deceased Khamanbhai, were going to Virapura to attend marriage and in the field of Jeetabhai, both the accused came and present appellant original accused No.2 shoot the arrow to her husband and after withdrawing the arrow from the body of her husband, both of them ran away. Thereafter, Ranajitbhai, PW-4, Ramesh, Bhula Chhota and Sarpanch etc came to the spot. In her cross-examination, she denies the fact that at the time of incident she was not present with the deceased.

8. PW-4 Ranajitbhai Dhirubhai, is examined as an eye witness. According to him, the incident occurred at 5.00 p.m. in the field of Jeetabhai. His residence is situated near the field of Jeetabhai. He was standing in the doors of his house and witnessed that the accused pelted arrow towards Khamanbhai, which was hit on the left side of deceased Khamanbhai. The deceased had fallen down and both the accused ran away. It was suggested to the witness that the door of his house was abutting to northern direction and the incident took place on western direction. According to witness in cross-examination, his house was situated near the house of Phuliya and there was no hedge around the field of Phuliya. Contradiction is sought to be proved in his evidence by the defence.

9. PW-5 Chandubhai Jagabhai is examined at Exh. 17 is not an eye witness of the incident, but was Sarpanch at the relevant time of the village. According to him,

at about 5'O clock, on the day of incident, Ramesh Bhula came to his house being brother of the deceased. He stated that the appellant had shoot arrow to his brother Khamanbhai. Therefore, Ramesh Bhula and this witness went to the place of incident which he described as place near the vadi of Mansukh Dhana, where the dead body of Khaman was lying. At that time, Govindbhai Bhalabhai, Phuliyabhai and Mansukhbhai were present. This witness inquired, according to him, who pelted the arrow and those persons said that appellant pelted the arrow and accused No.1 Rameshbhai was with him. He then wrote a report of police and gave it to Govindbhai Bhalabhai to deliver the same to Ramsera Outpost. In his cross-examination, he denied that he stated before the Police that PW-2 Govindbhai Bhalabhai informed him about the incident. According to this witness, in cross-examination, he had given report to Ramesh Bhula at 5.00 p.m. on that day and he immediately started for Ramsera from the place of incident along with the report. In cross-examination, this witness has admitted that there was hedge all around the house of Phuliya.

10. PW-6, Exh.18, Navalsinh Udesinh is panch of arrest panchnama and discovery panchnama which is at Exh. 28, but this witness has not supported the prosecution version or panchnama. According to him, he was called by the Police on 25.4.1994 at about 8.00 p.m. at the residence of Abdulbhai Karim where he was asked to sign some papers and he signed those papers. Thereafter, they went to hills in the forest where the accused were apprehended and from the accused the police seized bow and arrows. Out of those arrows, one arrow was found with blood. He has been declared hostile and cross-examined by the prosecution.

11. PW-7 Kalubhai, Exh.19 is the second panch of panchnama at Exh. 28, as aforesaid. He did not support the prosecution case and stated that on 25.5.1994 at about 6.00p.m. all the signatures in panchnama were obtained by the police at the residence of one Abdulbhai Karim. This witness is also cross-examined by the prosecution after declaring him hostile.

12. PW-8 - Exh.20 Abdul Karim Miyabhai is panch of scene of offence, which is produced at Exh. 21. He has supported the panchnama of scene of offence.

13. PW-9 - Pratapsinh Bapubhai Bariya is examined at Exh.22. At the relevant time, he was Circle Inspector of Shivrajpur Police Station, and according to yadi of the police station and panchnama of scene of offence, he

prepared a map of place of incident, which he produced at Exh.24. In cross-examination, he admitted that he had not shown the house of Ranajit Dhiru in Exh.23. He admitted that he prepared the map according to panchnama in the month of August, 1994. He admitted that the house of Phuliya is situated in the southern direction of the place of incident and doors were facing towards eastern side, and the back of the house was towards the place of incident. He also admitted that the house of Bhula Chhota and other houses were situated towards eastern division and their back was towards the place of incident. He admitted that when he went for preparing a map, there was a hedge, all around the field of Phuliya.

14. PW-10 Ajbasinh Laxmanbhai is examined at Exh.24. According to him, on 23.5.1994 he was stationed as Police Constable at Ramsera Outpost. Other Head Constable was Amarsinh Rumalbhai. On that day, PW-2 Govindbhai of village Desar reached at about 12'O clock in the midnight and stated that murder of his nephew was committed. Therefore, he along with Govindbhai and one other person, all the three went to Halol on foot and reached Halol at about 4.45. At Halol Police Station, Vahesinh, Head Constable was present, who registered the offence and thereafter in the presence of Inevestigating Officer PSI - PW-11 Parvatsinh, PW-2 Govindbhai offered his complaint. In cross-examination, he has admitted that village Ramsera is 6 kms away from village Desar where the incident took place. While Halol is 18 Kms away from Ramsera. According to him, during day time, vehicles were available between Ramsera and Halol, but vehicles were not available during night time.

15. PW-11 Parvatsinh Virsinh Baria, Exh.25 is Investigating Officer, who was senior PSI at the relevant juncture. He stated that on 24.5.1994, Govindbai Bhalabhai offered is complaint which he recorded. He produced the said complaint at Exh. 26. He registered the offence and took over the investigation.

16. In addition to the above evidence, inquest panchnama is also produced on record at Exh. 28 and postmortem note is also produced at 8. From the above evidence, the learned Trial Judge, came to the conclusion that there was no reason to disbelieve eye witnesses i.e. PW-2 Govindbhai, PW-3 Kidiben and PW-4 Ranajitbhai Dhirubhai and, therefore, after placing reliance on these eye witnesses, the learned Trial Judge convicted the appellant for the charges proved against the appellant under Sections 302 and 504 of the IPC and sentencing him for the imprisonment of life and fine of Rs.1,000/-, in

default to undergo rigorous imprisonment of two months.

17. Scanning the evidence carefully and scrutinising creditworthiness and trustworthiness of the witnesses, it appears that the learned Trial Judge has fell in error in placing reliance on eye witnesses i.e. PW-2, PW-3 and PW-4. We have travelled each corner of the record and we have taken threadbare scrutiny of the evidence adduced by the prosecution. The mere fact that the witnesses are consistent in what they say, is not a sure guarantee that they are truthful. The court must take into consideration the totality of the circumstances and come to the conclusion that witnesses may be posing themselves as eye witnesses. Though they may be consistent, their evidence may not be acceptable for the given reasons. On scrutiny if it is found that the conduct of the witnesses is such that it makes the case of the prosecution doubtful or incredible and their presence at the place of occurrence as eye witnesses is suspected, the court must reject their evidence. Therefore, it is utmost necessary that the evidence of witnesses must be scrutinised in detail, and the court must be satisfied that the prosecution proved its case beyond reasonable doubt. It appears that the Trial Court failed in this exercise.

18. We shall appreciate and scrutinise the evidence of each of the witnesses independently as well as collectively. When we appreciate the evidence of PW-2 Govindbhai, we found inherent infirmity and major contradictions as to reject his evidence as an eye witness. The prosecution story, as revealed in FIR, placed on record at Exh. 26, clearly reveals that PW-2 Govindbhai witnessed the incident from the scene of offence. This is evident from the FIR and the contradiction proved by the defence from the evidence of PW-11 Investigating Officer. True it is that First Information Report is not substantial peace of evidence but still is an important document of declaration first point in time before the authorities about the incident. His version originally as revealed from the FIR is, he was at his residence, he noticed both the accused and deceased in the field of Jeethabhai and there was some hot exchange about the theft committed. Therefore, he ran from the house and reached at the spot of incident occurred. The clear version therefore, is, he witnessed the incident right from the scene of offence. When we appreciated his evidence before the court, however, he has stated that the incident took place when he was at his residence. He witnessed the incident from his residence. This is a major contradiction discrediting the truthfulness of the witness. True it is that, the

minor discrepancies in the evidence particularly when the witnesses are rustic and villagers and illiterates, would not be fatal to the prosecution case, but when the whole version of the witness in its totality appears to be stated with falsehood, in murder trial, no credit can be attached to such witness. This is not enough, the prosecution case as has been disclosed by the evidence, deceased Khamanbhai was then accompanying with his wife Kidiben PW-3 for going to village Virapur to attend the marriage, PW-2 Govindbhai who claims to be present at the scene of offence right from the beginning to the end till the Sarpanch handed over him a report to be delivered to Ramsera Outpost does not make any reference of PW-3 Kidiben that she was accompanying the deceased when the incident took place. This is a major contradiction and infirmity in the prosecution case leads to an inference that either Kidiben is planted witness or that PW-1 Govindbhai never witnessed the incident as he claims to have seen. In any case, this infirmity is such as to render the prosecution case doubtful because one of the witness for the reasons best known to them is not obviously revealing the incident truly as it had occurred. Had the incident been seen by PW-2 Govindbhai, there could not be any difficulty for PW-2 to depose that PW-3 Kidiben, widow of the deceased was accompanying with the deceased at the time of the incident. This infirmity leads ultimately to the conclusion that none of them PW-2 or PW-3 might have witnessed the incident. When such conflicting two views are emerging from the prosecution case, the view favourable to the accused should be accepted.

19. Along with this, there are other contradictions also, which creates shawdow of doubts on the credibility of PW-2 Govindbhai as well as upon the evidence of PW-3 Kidiben. It is surprising that according to PW-2 Govindbhai, he went to call Sarpanch, PW-5 Chandubhai along with Ramesh Bhula. PW-5 Chandubhai did not support this version of PW-2 Govindbhai and stated that he was called by Ramesh Bhula. On scrutiny, it is further revealed that PW-5 Chandubhai who reached at the spot soon after the incident could not found Kidiben PW-3 present at the scene of offence. Natural conduct of a wife could be not to leave the dead body of husband till some arrangements are made. PW-5 Chandubhai categorically stated that the dead body was near the wadi of Manusukh Dhana where PW-2 Govindbhai, Bhula Chhota, Mansukh Dhana were present. He inquired from them that who pelted the arrow and they replied that appellant pelted the arrow. Therefore, when we appreciate the evidence of PW-2 Govindbhai, PW-3 Kidiben and PW-5

Chandubhai, individually and collectively, we found that the presence of PW-3 Kidiben at the scene of offence becomes doubtful and it also becomes doubtful whether PW-2 Govindbhai had witnessed the incident on account of different version and improvements he has made in his deposition. Above all, it is not explained by the prosecution that village Desar is 6 kms away from village Ramsera and Ramsera is away by 18 kms from Halol. The complaint came to be lodged on the next day at about 6.00 a.m. The Sarpanch PW-5 Chandubhai, categorically stated that at about 5.00 p.m. on the day of incident, i.e. soon after of the incident, he wrote a report and delivered to Ramesh Bhula, and on receiving that report Ramesh Bhula immediately started from village Desar to village Ramsera where police Outpost is situated to get the same registered. We find lame explanation from PW-2 Govindbhai that Govindbhai travelled on foot upto Halol via Ramsera and reached Halol in the morning. If this fact is appreciated in natural course of events, it is clear that one would not take hours together to reach to Halol i.e. 25 to 30 kms away.

20. On appreciating the evidences, it is seen that house of PW-2 Govindbhai is nowhere near the scene of offence. On going through the panchnama of scene of offence, which is placed at Exh.21, and the map prepared by Circle Inspector, which is at Exh.23, it is found that no house of PW-2 is situated within the boundaries of the scene of offence when in the First Information Report he claims to have ran from his house to the scene of offence immediately while in deposition before the court PW-2 Govindbhai claims to have seen the incident from his residence. A fact which is required to be appreciated along with this is about the hedge around the house of Phulabhai. From the panchnama of scene of offence and map, it is clear that between the scene of offence and the other houses, there is a house of one Phulabhai, facing towards eastern direction. If there was hedge all around the house of Phulabhai then the other houses situated in southern eastern direction are situated in a manner that the residents of such houses could not have seen anything happening in the field of Jeethabhai, which is about 450 feet away from such houses and, therefore, it appears that in his deposition PW-2 Govindbhai is not consistent about the hedge being 6 feet height all around the houses of Phulabhai. While this fact is admitted by PW-5 Chandubhai that there was hedge all around the houses of Phulabhai.

21. Prosecution examined Ajbasinh Laxmanbhai, PW-10, to be the Head Constable of the Outpost of Ramsera on the

relevant day. In his cross-examination, he admitted that whenever any incident is reported to the Outpost, In-charge Officer is duty bound to record the occurrence report. In the present case, witness PW-10 Ajbasinh claims to be In-charge Officer of Ramsera Outpost, did not record the occurrence report. On the contrary, he stated that he accompanied to Halol with PW-2 Govindbhai and both of them reached at Halol Police Station at about 4.45 p.m. The report which PW-5 Chandubhai prepared to be delivered to the Outpost at Ramsera has never been referred to by this witness or PW-2 Govindbhai as to what happened to the said report. Further, categorically PW-2 Govindbhai stated that the complaint (FIR) came to be filed by him at 12.00 O' clock midnight on the day of incident at the Police Station.

22. The evidence of PW-2 Govindbhai and the evidence of PW-10 Ajbasinh Laxamanbhai, appreciating cumulatively, then it renders the prosecution case doubtful because firstly the report which Sarpanch wrote becomes invisible from the scenario and secondly Investigating Officer PW-11 Parvatsinh Virsinh did not refer that PW-10 Ajbhasinh Laxamnbhai, Head Constable of Ramsera Outpost accompanied PW-2 Govindbhai Bhalabhai either with or without the report. Investigating Officer PW-11 Parvatsinh Virsinh states that at about 5.45 PW-2 Govindbhai came to Halol Police Station and he recorded the complaint of PW-2 and took over the investigation after registering the offence. PW-11 Parvatsinh also admits that Officer In-charge of Outpost is duty bound to record the occurrence report when any offence is disclosed before him. In cross-examination again, Investigating Officer PW-11 confirmed that complainant alone came to Halol Police Station at about 5.45. In this respect, PW-2 Govindbhai stated in his deposition that via Ramsera he reached at Halol Police Station at 12'O clock in the midnight of the incident in company of PW-10 Ajbasinh and his complaint was recorded.

23. The attempt on the part of PW-2 and PW-3 to be an eye witnesses to the incident is fatal to the prosecution case because on appreciating of their evidence, it becomes doubtful that any of them i.e. PW-2 or PW-3 was present when the incident took place. The wound of arrow had been received by the deceased on left side of the body near last ribs, perhaps, therefore, PW-2 Govindbhai stated in his deposition that the deceased was going east to west and the accused pelted arrow from southern direction, and this fact did not find any place in the First Information Report, which is at Exh. 26. This

contradiction is proved by the defence. Therefore, in the totality of the circumstances, we are unable to accept the evidence of both these eye witnesses to be gospel truth to convict the appellant for the serious offence like murder. Moreover the arrest panchnama of the accused and the discovery panchnama of arrow and bow from the accused appellant is not proved, but we appreciate the evidence of PW-1 Dr. Sunilkumar Nagori, Exh.7, then it is clear that, had the accused appellant extracted arrow from the dead body of the deceased, then, fountain of blood was likely to be oozed from the wound forcefully so as to sprinkle on the body and the clothes of the accused. Now, it is not the prosecution case that the clothes of the accused were blood stained. Therefore, the claim of both the eye witnesses, PW-2 and PW-3 to have seen the present appellant accused to have extracted the arrow and ran away in the forest, stands doubtful and discreditworthy. Therefore, the evidence of the above witnesses in the murder trial has to be carefully examined and must be put to the anvil of the judicial scrutiny to segregate the truth from the falsehood. It is easy for any witness to claim to have seen the incident and, therefore, the cardinal principle of appreciating of evidence mandates that a statement of witness cannot be taken to be absolutely true on its face value but must be evaluated by appreciating attending circumstances of the prosecution case as well as creditworthiness of a witness which depends upon various aspects. When it appears that there are major contradictions in the version of prosecution witness, and that when it is found that the version cannot stand the ordinary course of events, then the value of such evidence becomes worthless. The trial judge failed to undertake this exercise to find out whether the evidence of the eye witnesses suffers from inherent infirmity. The duty of the court is to see that no real culprit is escaped and no innocent accused is convicted.

24. After appreciating the evidence of PW 2, 3 and 5, now the evidence of PW-4 eye witness Ranajitbhai Dhirubhai is required to be scrutinised. He claims to have seen the incident of shooting of an arrow by the appellant and killing Khamanbhai from his house and according to him, his residence was situated 50 feet away from the scene of offence. He claims that at the time of incident, he was standing between the doors of his house. He also claims to have heard that both the accused were scolding the deceased Khamanbhai that why Khamanbhai had involved the accused in the theft case. He stated that on hitting the arrow on left side, Khaman was fallen down and was died and both the accused ran away in forest with

arrow and bow. He has been examined by the defence in cross, but the crucial fact which is required to be appreciated while scrutinising this short deposition of the eye witness is, was there any possibility or probability of this witness to have seen the incident. When totality of attending circumstances are taken into consideration, it appears that the claim of the eye witness PW-4 Ranajitbhai Dhirubhai to have seen the incident is not credible. In this respect, it is necessary to refer to the panchnama of scene of offence placed at Exh.21. This panchnama is duly proved and in the boundaries, which is mentioned about in the circumference of 350 feet, nowhere the house of Ranajitbhai Dhirubhai is mentioned and, therefore, the claim that the house of PW-4 Ranajitbhai Dhirubhai situated 50 feet away from the scene of offence is falsified by the remaining prosecution evidence itself. Likewise, when map of scene of offence is considered which is placed at Exh.23, along with the panchnama of scene of offence placed at Exh.21, it is found that in the southern - eastern direction only house of Phuliyabhai is situated and that is away by 150 feet. Thereafter on further southern - eastern direction of this house, other houses are situated which are at the distance of about 300 feet from the house of Phuliyabhai. Other houses on the eastern side are situated from the scene of offence at the distance of 350 feet. So, nowhere it is found that near the scene of offence at about the distance of 50 feet as claimed by the witness nor around 400 feet of the scene of offence in any of the boundaries, the house of Ranajitbhai Dhirubhai is situated. The claim of having seen the incident from the doors of his house also is not believable because as per the map produced at Exh. 23 all the doors of the house situated within the circumference of 400 feet from the scene of offence are facing towards southern or southern - eastern direction and the back of such houses are towards the scene of offence. One more aspect emerges from the prosecution evidence which is also required to be appreciated that there was hedge all around the house of Phuliyabhai and, therefore, none of the residents of the houses situated on southern eastern direction of the house of Phuliyabhai could have noticed and witnessed the incident from their residence. This scrutiny of evidence leads us to believe that witness PW-4 Ranajitbhai Dhirubhai is also a planted witness, and in natural course of event, as has been disclosed by the prosecution evidence, it was not possible for this witness to have seen the incident or to have overheard the altercations taken place between the deceased and the accused. Therefore, along with other two eye witnesses i.e. PW

No.2 Govindbhai and PW-3 Kidiben, this witness also does not inspire conference as to the truthfulness of his deposition.

25. Except above said three eye witnesses, namely, PW-2, PW-3 and PW-4, all other witnesses are supporting witnesses. Out of them, PW-6 Navalsinh Udesinh and PW-7 Kalubhai Ganabhai are the panch witnesses of Panchnama Exh. 22 about the arrest of the accused, but none of these witnesses has supported the panchnama nor the prosecution case. PW-6 Navalsinh Udesinh and PW-7 Kalubhai Ganabhai are also the panch witnesses of discovery panchnama placed on record at Exh. 28 and as per the prosecution case, an arrow with blood stains was recovered from the present appellant but this panchnama at Exh. 28 is also not duly proved by the prosecution. In this view of the matter, prosecution failed to prove the case beyond reasonable doubt through ocular witnesses as well through other supporting witnesses also. The result of analysis done by the Forensic Science Laboratory placed on record at Exh. 30 is of no avail to the prosecution in absence of proving recovery of weapon from the appellant.

26. In the above view of the matter after analyzing, sifting and assessing the evidence of record with reference to trustworthiness and truthfulness and credibility of each of the prosecution witnesses by a dispassionate judicial process, adopting an objective and reasonable judicial scrutiny of the evidence, it is found that the witnesses are not credible witnesses and no reliance can be placed upon them to convict the present appellant - original accused No.2, for the above reasons. Thus, taking comprehensively and completely vital features of the case of the prosecution, it is found that the prosecution case suffers from inherent infirmities and could not prove its case beyond reasonable doubt. As aforesaid, the learned Trial Judge fell into error of convicting the present appellant No.2 because the learned Trial Judge failed to appreciate the vital aspect that though the eye witnesses stated to have seen the incident but to what extent credence can be attached to the said witnesses. In this view of the matter, we are unable to uphold and sustain conviction of the appellant as awarded by the Trial Court under Sections 302 and 504 of the IPC. The present appellant is entitled to the benefit of doubt and consequently acquitted from the charges levelled against him.

27. In the result, this Appeal is allowed. Judgment and order passed by the Trial Court which is dated

6.5.1995 convicting the present appellant for the charges proved against him under Sections 302 and 504 of the IPC and sentencing him for the imprisonment of life and imposing a fine of Rs. 1,000/- is hereby set aside. Present - appellant i.e. original accused No.2 Rameshbhai Maniyabhai Nayak is acquitted for the above said charges levelled against him. Fine if paid any be refunded to the appellant. The rest of the order of the Trial Judge in respect of muddamal is left uninterferred. The appellant accused is on regular bail by order of this Court dated 17.3.2003 in Criminal Misc. Application No. 1648 of 2003 and hence the bail bonds of the appellant stands cancelled.

(B.J.Shethna,J.)

(J.R.Vora, J.)

p.n.nair